

2/4/12/8

A04

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 1
CHARACTER OF DEMOCRATIC
STATE**

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1 CHARACTER OF DEMOCRATIC STATE

MINUTES OF THE FIFTH MEETING OF THEME COMMITTEE 1 MONDAY 14 NOVEMBER 1994 (08H00)

Present

P G Marais (Chairperson)

Chiba L (Alternate)	Moorcroft E K
Cwele C S	Mulder P W A
Dyani M M.	Niehaus C G
Fani L M	Nzimande B E
Felgate W	Routledge N C
Ginwala F	Schoeman E A
Gumede D M	Seaton S
Kekana N N	Shope G
Macozoma S J	Shope N R
Mahlangu N J	Streicher D M
Majola-Pikoli N T	Swanepoel L (Alternate)
Meshoe R K	Van Deventer F
Mohale M	Van Zyl I D (Alternate)
Momberg J H	Williams A J
	Zondi M

Apologies: B H Vilakzi and N E Hangana

L. Rammble and K. Radu were in attendance.

1. OPENING AND WELCOME

The meeting was opened by the Chairperson.

2. MINUTES OF THE PREVIOUS MEETING

The minutes were adopted.

3. MATTERS ARISING

The Secretariat reported that the legal department of the CA was in the process of obtaining legal advice on Rules 36 and 37 dealing with the appointment and functions of a commission.

4. REPORT ON THE WORK PROGRAMME

4.1 A proposal was made to adopt the 3rd draft of the report as the work programme and that the 4th draft should be a supplement to the 3rd draft.

4.3 A counter proposal was made to effect that the 4th draft be adopted as the work programme since this document contained the detail position of the various parties.

4.4 The meeting unanimously resolved, that the document to be submitted as Theme Committee 1 Report should consist of:

Section A to E of the 3rd Report (indicating amendment A)

The 4th Report will then form an appendix or an addendum thereof.

AMENDMENT A:

A paragraph be added indicating that, " This report is a working document and guidelines whose contents may be added to or amended by the Theme Committee at any time".

All parties will have the right to submit any amendments to their positions as set out in the **4th Report** by 08h00, 15 November 1994. These will be accepted by all other parties.

The meeting rose at 09h55.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1 WORK PROGRAMME REPORT

TO: The Constitutional Committee

FROM: Theme Committee 1

The document to be submitted as Theme Committee 1 Report should consist of:-

- 1) Section A to E of the 3rd Report (indicating amendment A)
with the 4th Report as an appendix / addendum

Amendment A:

A paragraph be added indicating that, "This report is a working document and guidelines whose contents may be added to or amended by the Theme Committee at any time."

All parties will have the right to submit any amendments to their positions as set out in the 4th report by 08h00, 15 November 1994. These will be accepted by all other parties.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1 REPORT ON WORK PROGRAMME (3RD DRAFT)

The following report notes the various non-contentious issues which were agreed upon by members of the Theme Committee. Where there has been no discussion or agreement, the submissions made by the various parties have been outlined in detail.

(A) ISSUES TO BE DEALT WITH ON A PRIORITY BASIS

- I) Democracy
- II) Equality
- III) Supremacy of the constitution
- IV) Representative Government
- V) Accountability

(B) ISSUES TO BE DEALT WITH IN COMMISSIONS

- I) Name of State and symbols
- II) Division of Powers

(C) TECHNICAL ASSISTANCE REQUIRED

- I) Proportional representation
- II) The rights of prisoners, expatriates and permanent residents need to be discussed by the theme committee and technical committee.

(D) AREAS OF OVERLAP WITH OTHER THEME COMMITTEES

- I) Representative government and Division of Power should also be dealt with in Theme Committee 2.

(E) STRUCTURES AND PEOPLE TO BE CONSULTED

- I) Provinces
 - II) Political Organisations
 - III) Mass Organisations
 - IV) N.G.O's
 - V) Universities and Institutes
 - VI) Traditional Leaders
 - VII) Commission on Provincial Government
 - VIII) Provincial Government
 - IX) Council of Traditional Leaders
 - X) Volkstaat Council
 - XI) Municipal and local structures and organisations, eg. Transvaalse Munisiplae Vereniging, etc.
 - XII) Church Organisations
- 2

(F) SEPARATE REPORTS

The NP

- VI) Preamble
- VII) Single sovereign state
- VIII) Common South African citizen
- IX) Democracy
- X) Supremacy of the constitution
- XI) Regular elections
- XII) Suffrage
- XIII) Representative government
- XIV) Name and definition of the territory of the State
- XV) National Symbols
- XVI) Official languages
- XVII) Separation of power among legislative, executive and judicial authorities
- XVIII) Other matters to be determined from time to time

The FF

- XIX) Preamble of the Constitution
- XX) Single Sovereign State
- XXI) Division of Powers

The ANC

- XXII) Single sovereign state
- XXIII) Supremacy of the constitution

(G) NUMBER OF REPORTS REQUIRED AND DEADLINES

The ANC and FF

- I) It is too early to determine the above

The NP

- II) Reports on all themes should be submitted to the Constitutional Committee and progress and trial reports could be submitted from time to time.

The NP further made the following suggestions regarding the nature of the reports and the proposed time frames.

Nature of the reports

Since the Theme Committees may not negotiate, in other words may not take decisions, it is recommended that all reports should analyse the problems, offer more than one solution or definition and leave the decision to the CC. The theme committee could, where possible, indicate preference.

Proposed time frames

- a) The proposed reports 2 (VII) and 12 (XVII) should take priority, since they are crucial to the continuation of the entire process.
- b) All theme committee members give joint consideration to these matters;
- c) Technical assistance is obtained particularly in respect of those two matters; and

- d) That at the same time as the above, subcommittees attend to reports 1 (VI) and 3 (VIII) to 11 (XVI) with a view to submitting it to the Theme Committee by the end of March.

(H) COMMUNITY AND MEDIA LIAISON ASSISTANCE REQUIRED

The FF

- I) SACS should be consulted

The NP

- II) Party structures should be used for communication
- III) People in rural areas must also be consulted
- IV) State and privately owned media should be requested to carry information programmes on process as well as substance

The ANC

- V) A fully fledged Communication Media Liaison Unit of the CA to serve all Theme Committees.
- VI) Communication through whatever media to keep public informed.

(I) PROCESS / GENERAL

The NP

- I) The study material obtained during the Kempton Park phase should be made available to the theme committees.

**REPORT A001
FOURTH DRAFT**

The following report notes the various issues raised by the parties under the sub-headings of the the Themes agreed to.

A) ISSUES TO BE DEALT WITH ON A PRIORITY BASIS

1. DEMOCRACY

NO.	PARTY	PARTY POSITION
1.	IFP	<p>1. SEPARATION BETWEEN CHURCH AND STATE</p> <p>1.1 Church and State should be totally separated.</p> <p>1.2 The limitations on the State to take any action which promotes, supports or hinders any given church or religion in general.</p> <p>1.3 The State should not be involved in any religious matter.</p> <p>1.4 Churches and politics.</p> <p>2. TYPE OF STATE</p> <p>2.1 The ideal of South Africa being a social State but not a socialist state.</p> <p>2.2 Private property and free-market enterprise and the role of government in economic matters should be severely limited.</p> <p>2.3 Recognition in the constitution of all recognized social and economic rights.</p> <p>2.4 Constitutional imperatives which mandate the legislature to remove social injustice, and promote the social growth of all South Africa.</p> <p>3. SEPARATION OF POWERS</p> <p>3.1 The power of the state is to be exercised within the restraints of a democratic system in which the rigidity of the constitution, the accountability of government, the guarantees of human rights are enhanced by the separation of powers.</p> <p>4. SINGLE SOVEREIGN STATE</p> <p>4.1 This heading does not represent a separate "constitutional issue" but it is rather a qualification or guideline which affects all the issues listed under "Democracy".</p>

No.	PARTY	PARTY POSITION
1.	IFP	<p>5. CITIZENSHIP</p> <p>5.1 Entitlement to citizenship.</p> <p>5.2 The purpose of a constitutional definition of citizenship.</p> <p>5.3 Unified notion of citizenship.</p> <p>5.4 Citizenship and the relationship between provincial governments and their subjects.</p> <p>6. WHAT TYPE OF DEMOCRACY?</p> <p>6.1 How far should the principle of democratic representation extended?</p> <p>6.2 How does the democratic principle related to:</p> <ul style="list-style-type: none"> - pluralism - the notion of autonomy of social, cultural and economic formations? <p>6.3 Participatory democracy.</p> <p>6.4 Recognition and entrenchment of an area of protected constitutional economy for social, cultural and economic formations.</p> <p>7. SUFFRAGE</p> <p>7.1 Active and passive voting rights.</p> <p>7.2 Different notions could be employed for active and passive voting rights.</p> <p>7.3 Different notion of suffrage could be employed at national and provincial levels.</p> <p>8. SEPARATION OF POWERS (FORM OF STATE)</p> <p>8.1 How are the powers between national and provincial levels of governments to be separated?</p> <p>8.2 Concurrent powers versus exclusive powers.</p> <p>8.3 Relation between national overrides, or framework legislation, or general principles of legislation and concurrent or exclusive provincial powers.</p> <p>8.3.1 Relations between provincial and national levels of government regulated by checks and balances.</p>

No.	PARTY	PARTY POSITION
1.	IFP	<p>8.3.2 Intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the powers of one level of government into areas of competence of the other, as in theory is the case in the U.S. (i.e.: interstate commerce).</p> <p>8.4 The separation of powers between any level of government and civil society.</p> <p>8.5 Separation between the powers of any government and civil society: recognition of an area of autonomy for individuals as well as social, cultural and economic formations.</p> <p>8.5.1 Autonomy in terms of the capability of interests to self-regulating and administering in respect of which no government has a compelling reason of public interest to intervene.</p>

2.	FF	<ol style="list-style-type: none"> 1. Democratic rule in South Africa. The nature, excellence and limitations of democracy. Democratic governance at all levels. The origins and scope of democratic thinking. 2. Systems of democracy: <ul style="list-style-type: none"> * Liberal Democracy * Multiparty Democracy * Democracy in traditional African communal societies. * Traditional leaders and democracy. * The Freedom Charter and democracy. 3. Pluralistic Society and democratic rule. Minority rights in a democracy? Group domination and democracy. Self-determination and inclusive democracy. 4. A democratic culture in Society in South Africa. <ul style="list-style-type: none"> * Freedom of information * Press freedom * Tolerance * Direct democracy: referendum, petitions, mass action 5. Democracy and State formation
3.	PAC	<p>Since democracy has throughout history been understood differently for implementation, we felt that it should, in our case, mean a constitutional right to representation in the entire governing process. This constitutional right should vest in all citizens of the country without any regard as to race, class, religion or gender.</p> <p>We also maintain that our democracy shall mean nothing if it will not guarantee equal access of the citizens to economic empowerment. We held as idiomatic that political democracy with no economic democracy is no democracy.</p>

No.	PARTY	PARTY POSITION
4	DP	1.1 Universal Adult Suffrage 1.2 Regular free elections. 1.3 The guarantee of Civil Liberties especially freedom of expression and association. 1.4 The independence of the judiciary. (the above "lock together" as a cluster) 1.5 Built-in, racially / ethnically defined majorities are critical to democracy because democracy presupposes the reasonable alternation of government and / or the shifting bases of coalition.
5	ACDP	What do we understand by democracy? What type of democracy? a) Liberal democracy b) Christian democracy c) Democracy d) Multiparty democracy
6	ANC	1. Representative Government (Principle VI) 2. Participatory democracy and Accountability (Principle IX) 3. Equality, Affirmative action 4. Sovereignty 5. Citizenship and Franchise 6. Separation of Powers 7. Majority Rule
7	NP	Single Sovereign State, including: * Common Citizenship * Democracy * Equality * Minority rights * Regionalism / Federalism

2. EQUALITY

No.	PARTY	PARTY SUBMISSION
1	IFP	<p>1.1 Principle of equality to be entrenched in the Constitution in the context of:</p> <p>1.1.2 Formal equality to be entrenched.</p> <p>1.1.3 Entrench the principles of substantive equality.</p> <p>1.1.4 Promoting equal opportunities.</p> <p>1.1.5 Promoting equal access to opportunity.</p> <p>1.2 Implementing the principle of equality and the areas of national and provincial jurisdiction.</p> <p>1.2.1 The principle of equality to be implemented and enforced exclusively by the National Government.</p> <p>1.2.2 The principle of equality to be implemented exclusively in their areas of competence.</p>
2	FF	<p>Brotherhood, freedom, equality and justice for all citizens.</p> <p>Political and economic democracy.</p> <p>Citizenship.</p> <p>Universal suffrage.</p> <p>Equal responsibilities. Conscription, taxes.</p> <p>Constitutional protection of citizens.</p> <p>Fundamental Rights</p> <p>Civil Rights</p> <p>Religious Freedom</p> <p>Freedom of conscience</p> <p>Cultural protection.</p>
3	PAC	<p>Equality should mean an implementation of the process that will in an evolutionary undermine and eventually and finally do away with class cleavages founded on economic exploitation</p>
4	DP	<p>1.1. Equality before the law.</p> <p>1.2 Equality of worth (dignity, respect).</p> <p>1.3 Equality of opportunity.</p>
5.	ACDP	<p>Every person shall have the right to equality before the law and equal protection of the law. Every person, including unborn children shall have equal right to life.</p>

3. SUPREMACY OF THE CONSTITUTION

NO	PARTY	PARTY POSITION
1	IFP	<p>1.1 The form in which the Constitution shall be the supreme law of the land.</p> <p>1.1.1 Shall the Constitution apply in its entirety to interpersonal relationships?</p> <p>1.1.2 To which extent should the Constitution apply with respect to the area of provincial authority?</p>
2	FF	<p>A Concepts of the Constitution and the role of the Constitution: The Supremacy of the Constitution - A Rechtstat</p> <p>B One Sovereign State: The principles and practice of Statehood. Sovereignty, unity and integrity. Police and defence. Pluralism and State Loyalty. Nation building. The name of the State, symbols of statehood. Official languages. International positions.</p>
3	PAC	The Constitution must be where all state power resides.
4	DP	Clause 4 (Chap1) of the present interim Constitution reflects our position admirably.
5	ACDP	The Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of Government.
6	ANC	Supremacy of the Constitution
7	NP	Supremacy of the Constitution

4. REPRESENTATIVE GOVERNMENT

No.	PARTY	PARTY POSITION
1	IFP	<p>1.1.1 Political representation, participatory democracy, direct democracy and individual and collective autonomy.</p> <p>1.1.2 Systems of representations to reflect the plurality of our society, the degree of literacy and to promote the empowerment of people at all levels.</p> <p>1.1.3 Representative government must be made as autonomous at all levels of government.</p> <p>1.2 The type of provision should the Constitution make for representative government?</p> <p>1.3 The principle of political representation of government and regular elections should be Constitutionally entrenched with respect to national, provincial and " primary" local governments (excluding local government substructures, including traditional communities)</p> <p>1.3.1 The implementation of this principle with respect to provincial and local government should be left to the autonomy of the provinces.</p> <p>1.4 Provision shall be made for referenda to be held at the request of a reasonably small number of dissatisfied citizens at all levels of government.</p> <p>1.5 Principle of electoral representation in the Constitution.</p> <p>1.5.1 Provincial autonomy and principle of electoral representation in provinces.</p>
2	FF	<p>Participation at all levels Representation and systems of representation Elections, voters roll, regularity of elections, the electoral commission.</p>
3	PAC	<p>The Constitution should enshrine the fact that the government and as such no person shall be committing any crime is either disobeying it or seeking to overthrow.</p>

5. ACCOUNTABILITY

NO	PARTY	PARTY POSITION
1	IFP	<p>Freedom of Information :</p> <p>1.1 Procedures and mechanisms needed to make government as transparent as possible. The limits of discretion which should be set for Ministers of State charged with security matters.</p> <p>1.2 The Constitution and the right to access government information, 1.2.1 The right to access all government information and private data banks information entrenched in the Constitution subject to : 1.2.2 Customary qualifications and exclusions, subject to judicial review.</p> <p>Accountable administration:</p> <p>2.1 Political, legal, and judicial mechanisms to make government accountable.</p> <p>2.2 How should the Constitution deal with the principle of administrative accountability?</p> <p>2.3 The notion of administrative justice and judicial reviewability of all administrative actions shall be Constitutionally entrenched.</p> <p>2.4 Public official shall be personally responsible for gross negligence and malice.</p> <p>2.5 Provisions to be made for the recognition of the right to petition any government structure.</p> <p>2.6 The Constitution should entrench the notion of participation of the affected public interest in the formative process of an administrative action or regulation.</p>

4	DP	Democracy by definition is representative government, but care must be taken to ensure that all sections of society are effectively able to be represented in government if by (government) is understood the executive arm of government.
5	ACDP	We would like to see the principle of party representation in government entrenched in the Constitution. There should also be regular elections at local, provincial and national level.

2	FF	<p>Administration and control mechanisms, Transparency Impeachment of representatives Controlling the abuse of power: Separation of power a. Legislative. Consultation on, preparation of, promulgation of bills. Parliamentary process. b. Executive c. Judicial</p> <p>Houses of parliament The role of political parties Fiscal Control</p> <p>Budget and Audit</p>
3	PAC	<p>The government must be seen to be accountable to the electorate. The Constitution should facilitate the easy challenging of the government or the State by any individual citizen.</p>
4	DP	<p>The principle is that the government is in the first place accountable to Parliament and in the second place to the electorate (including for every cent that it spends).</p>
5	ACDP	<p>The government must be accountable to those who put them into power. Administrative and moral accountability must be looked at very carefully.</p>
6	NP	<p>Accountability</p>

6. ISSUES LEFT TO BE CONSIDERED

No.	PARTY	PARTY POSITION
1	IFP	Preamble Name and symbols of country, Language, Economy constitution, Relation of international law and international legal system

B. ISSUES TO BE DEALT WITH IN COMMISSIONS

No.	PARTY	PARTY POSITION
1	ACDP	1) Name of the state and symbols The geographical position of our country suits the name "South Africa" perfectly. Because of this, the ACDP does not see the need of changing the present name. It is the symbols that may have to be changed. 2) Division of Power The power allocated to each level of government must be divided into legislative, judicial and executive powers.
2	ANC	1) Name of State and Symbols 2) Division of Powers
3	NP	1) Symbols 2) Separation of Power Each commission should have six members, one to be nominated by each participating party. The Commissions should investigate the matters referred to them with a view to providing the Theme Committee with all relevant information relating thereto.

C. TECHNICAL ASSISTANCE REQUIRED

No.	PARTY	PARTY POSITION
1	DP	Proportional Representation - Prof Hennie Kotze, Dept of Political Science, University of Stellenbosch.
2	ACDP	The rights of prisoners must be looked very carefully by the theme committee and technical committee. Criminals cannot have exactly the same rights as law abiding citizens. They must forfeit some if they are found guilty and receive a prison sentence.
3	NP	The service of three appropriately trained and experienced experts should be made available to the Committee <u>without delay</u> . Appointments should be made from the list published by the Directorate.

D) AREAS OF OVERLAP WITH OTHER THEME COMMITTEES

No.	PARTY	PARTY POSITION
1	NP	* Separation of Powers; and * Proportional representation are matters that also fall within the ambit of the work to be done by Theme Committee 2.

E) STRUCTURES AND PEOPLE TO BE CONSULTED

No.	PARTY	PARTY POSITION
1	NP	The consultation process should be in accordance with the Constitutional Assembly resolutions regarding public participation.

F) SEPARATE REPORTS

No.	PARTY	PARTY POSITION
1	NP	<ul style="list-style-type: none">* Preamble* Single Sovereign State* Supremacy of the Constitution* Separation of Powers
2	FF	<ul style="list-style-type: none">* Preamble* Single Sovereign State* Division of Powers
3	ANC	<ul style="list-style-type: none">* Single Sovereign State* Supremacy of the constitution

G) NUMBER OF REPORTS REQUIRED AND DEADLINES

No.	PARTY	PARTY POSITION
1	All Parties	Commission reports should be completed by the end of February and the cut-off date for Theme Committee reports should be the 15 March 1995, which should be submitted to the CC on the 31 March 1995.



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

SUBMISSION FOR THE DEVELOPMENT OF A WORK AGENDA BASED ON THE REPORT OF THEME COMMITTEE 1 TO THE CONSTITUTIONAL COMMITTEE

On November 14, 1994 Theme Committee 1 agreed on and tabled with the Constitutional Committee a Report (A001) which lists a set of issues which the parties have identified as forming part of its scope of work.

As a next step the Theme Committee will need to decide how to deal with each of the issues identified in the Report. Each issue will need to be understood with respect to the possible alternatives and the Theme Committee will need to develop an agenda with respect to each issue.

For the sake of the democracy and legitimacy of the constitution-drafting process it is essential that the agenda focuses on the identification of all possible and practicable constitutional alternatives falling under each issue. Each alternative will need to be weighed and the Theme Committee should be able to understand and assess its pros and cons. Only this exercise will enable the constitution-making process to justify its final constitutional decisions. We believe that the record of the constitution-making process should show to our posterity that we did consider all constitutional possibilities and alternatives on the basis of their respective merits and we adopted the constitutional solutions which we understood best serving the present and future needs, wants and aspirations of South Africa.

We also believe that the Theme Committee should sufficiently discuss the issues and receive sufficient inputs so as to form a general understanding and a preliminary opinion on each matter at hand. Only at that time the Theme Committee will be able to decide which issue may be dealt with by commissions and --if so authorized by the Constitutional Committee-- by sub-committees. In fact, it would be a mistake to delegate to commissions the formation of the Theme Committee's general understanding and preliminary opinion on any issue concerned. The Theme Committee's general understanding of each issue concerned is also essential to enable the Theme Committee to adequately frame the terms of reference of any given commission.

I. DEMOCRACY

1. SEPARATION BETWEEN CHURCH AND STATE

- 1.1 Church and State should be totally separated.

- 1.2 The limitation on the State to take any action which promotes, supports or hinders any given church or religion in general.
- 1.3 The State should not be involved in any religious matter.
- 1.4 Churches and politics.
- AGENDA Separation of state and church may create obligations for the State alone or for both the State and the church(es). Separation may be total or limited to certain and specified areas. The State could be merely barred from authorizing and/or regulating churches (establishment clause) or may also be barred from supporting or interfering with them (no state involvement clause). The different aspect of separation between state and church should be studied and classified.

2. TYPE OF STATE

- 2.1 The idea of South Africa being a social State but not a socialist state.
- 2.2 Private property and free-market enterprise and the role of government in economic matters should be severely limited.
- 2.3 Recognition in the constitution of all recognized social and economic rights.
- 2.4 Constitutional imperatives which mandate the legislature to remove social injustice, and promote the social growth of all South Africa.

AGENDA: State may be: Socialist State, European type "Social State", Liberal State, an undetermined type of state. The type of state is defined by the fundamental policies and decisions entrenched in the Constitution. The different types of states should be classified with respect to the list of constitutional choices which contribute to its determination, which range from the nature (horizontal or vertical) and extent of the bill of rights (social and economic rights) to the type of representative democracy and the constitutional obligation on the legislature. The extent and the role of government in social and economic life also contribute to define the type of State and various possibilities should be identified and analyzed. The type of state is also characterized by the relation between government and civil society.

3. SEPARATION OF POWERS

- 3.1 The power of the state is to be exercised within the restraints of a democratic system in which the rigidity of the constitution, the accountability of government, the guarantees of human rights are enhanced by the separation of powers.

4. SINGLE SOVEREIGN STATE

- 4.1 This heading does not represent a separate "constitutional issue" but it is rather a qualification or guideline which affects all the issues listed under "Democracy".

5. CITIZENSHIP

- 5.1 Entitlement to citizenship.
- 5.2 The purposes of a constitutional definition of citizenship.
- 5.3 Unified notion of citizenship.
- 5.4 Citizenship and the relationship between provincial governments and their

subjects.

AGENDA: There could be a unified notion of citizenship or more than one notions. Citizenship could be based on *ius sanguinis* or *ius solis* or on a combination of both. Citizenship could be an irrevocable right or it could be revoked under some specified circumstances, among which there could be political circumstances. The matter could be determined entirely by the constitution or it could be partially left to the discretion of the legislature. There could be naturalization in specific cases and could be a right on the basis of *ius sanguinis*. The Committee should study the purpose of the notion of citizenship and its relation to human rights protection.

6. WHAT TYPE OF DEMOCRACY?

6.1 How far should the principle of democratic representation extend?

6.2 How does the democratic principle related to:

6.2.1 - pluralism

6.2.2 - the notion of autonomy of social, cultural and economic formations?

6.3 Participatory democracy

6.4 Recognition and entrenchment of an area of protected constitutional economy for social, cultural and economic formations.

AGENDA: Direct democratic participation is different from the principle of democratic representation. Democratic representation and/or participation could be limited to legislative functions or they could be principles which permeate governmental structures and functions in their entirety. All powers could be granted to the government which exercise them on the basis of the applicable democratic principle, or alternatively some powers could be left to the autonomy of individuals and social, cultural and economic formations respectively, thereby limiting the scope and extent of government. The relation between individual and group freedom on the one side and the power of government on the other side should be carefully analyzed to determine how it relates to the needs of a plural society and to the promotion of pluralism. The principle of participatory democracy could be constitutionally entrenched. The principle the autonomy of individuals as well as of economic, social and cultural formations could also be entrenched with respect to all activities for which any level of government does not have a compelling justification to regulate, control or directly exercise. The principles of transparency and political and civil accountability of governmental structures could be constitutionally entrenched.

7. SUFFRAGE

7.1 Active and passive voting rights.

7.2 Different notions could be employed for active and passive voting rights.

7.3 Different notion of suffrage could be employed at national and provincial levels.

AGENDA: Different notions could be employed for active and passive voting rights. Different notions of suffrage could be employed at national and provincial levels. The Committee should research international and particularly African trends in determining voting rights, and the relation between provincial autonomy and the

notion of citizenship, with reference to the U.S. and the German systems.

8. SEPARATION OF POWERS (FORM OF STATE):

- 8.1 How are the powers between national and provincial levels of government to be separated?
- 8.2 Concurrent powers versus exclusive powers.
- 8.3 Relation between national overrides, or framework legislation, or general principles of legislation and concurrent or exclusive provincial powers.
- 8.3.1 Relations between provincial and national levels of government regulated by checks and balances.
- 8.3.2 intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the powers of one level of government into areas of competence of the other, as in theory is the case in the U.S. (i.e.: interstate commerce).
- 8.4 The separation of powers between any level of government and civil society.
- 8.5 Separation between the powers of any government and civil society: recognition of an area of autonomy for individuals as well as social, cultural and economic formations.
- 8.5.1 Autonomy in terms of the capability of interests to self-regulating and administering in respect to which no government has a compelling reason of public interest to intervene.

AGENDA: There are two types of separation of powers, that which relates to the form of state and that which relates to the form of government. As it relates to the state, the final power of the state could be divided between two levels of government. In terms of form of government, the power allocated to each level of government is divided into legislative, judicial, and executive powers.

A further division of power related to the form of state which can also be reflected in the constitution is the division of power between any level of government and civil society. Separation of power related to the form of state should be the object of a preliminary determination on the basis of the following questions:

- (a) will Provinces have residual powers, which are those powers of Parliament which are not immediately and necessarily reflected in a governmental line function?
- (b) as a matter of principle, will all the powers and functions of government be assigned to the Provinces and only those powers which cannot be adequately and/or properly exercised at provincial level be devolved to the national level of government on the basis of the principle of subsidiarity/residuality?
- (c) will the Provinces be provided with an area of entrenched constitutional autonomy which the central government may not destroy or change at its own will? [Indestructible Provinces in an indestructible Union]
- (d) will Provinces have final decision-making power in the area of their constitutionally recognized autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?

- (e) subject to the need for equalization grants, will Provinces have sufficient financial and fiscal autonomy to support their functions and powers without depending on the discretion and control of the central government?
- (f) will Provinces have the power to participate as Provinces in the legislative decision-making process and possibly with respect to some executive functions of the central government?
- (g) will the constitutional system allow for asymmetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?

II. EQUALITY

- 1.1 Principle of equality to be entrenched in the Constitution in the context of:
 - 1.1.2 Formal equality to be entrenched.
 - 1.1.3 Entrench the principle of substantive equality.
 - 1.1.4 Promoting equal opportunities.
 - 1.1.5 Promoting equal access to opportunity.
- 1.2 Implementing the principle of equality and the areas of national and provincial areas of jurisdiction.
 - 1.2.1 The principle of equality to be implemented and enforced exclusively by the National Government.
 - 1.2.2 The principle of equality to be implemented exclusively by the Provinces in the areas of their competence.

AGENDA: Formal equality will need to be entrenched. In addition the Constitution may entrench the principle of substantive equality. This can be achieved either by promoting equal opportunities or equal access to opportunity. The principle of equality may be implemented and enforced exclusively by the National Government or by the National Government and the Provinces in their respective areas of jurisdiction. All the main variations of the principle of substantive equality will need to be explored. The relation between substantive equality and the need of constitutional adjudication to be conducted by Constitutional Court only will also need to be explored. It will also be necessary to look at the many alternatives related to the application of the principle of formal equality with respect to the area of provincial autonomy. The difference between implementation and enforcement will also need to be fully explored.

III. SUPREMACY OF THE CONSTITUTION

- 1.1 The form in which the Constitution shall be the supreme law of the land.
 - 1.1.1 Shall the Constitution apply in its entirety to interpersonal relations?
 - 1.1.2 To which extent should the Constitution apply with respect to the area of provincial autonomy?

AGENDA: The Constitution may apply to intergovernmental relations only or also to interpersonal relations. The constitution may also apply in its entirety with respect to provincial autonomy or in the alternative only some portions of the constitution may apply with respect to provincial autonomy. Furthermore, there might be differentiation between direct application of the text of the constitution

to provincial autonomy and constitutional mandates which must be implemented by the provinces autonomously, with specific regard to the implementation of both sections of the Bill of Rights which require implementing government action (second, third and fourth generation human rights). The full analysis of the position for various constitutions in the respect to legal systems must be undertaken with specific attention to federal systems including the US, the German and the European Union models. Attention should be given to how the constitution, while applying to all organs of the Republic, may also apply to legal relations under the control of the Republic. The Committee should study how the Constitution in its entirety could not apply to Provinces, social and cultural formations, or individuals with respect to their area of constitutionally recognized autonomy, but some portions of may have some application. In this respect reference to the technique used in the Article IX and in 14th Amendment of the U.S.

IV. REPRESENTATIVE GOVERNMENT

- 1.1 Political representation, participatory democracy, direct democracy and individual and collective autonomy.
 - 1.1.2 Systems of representations to reflect the plurality of our society, the degree of literacy and to promote the empowerment of people at all levels.
 - 1.1.3 Representative government must be made as autonomous as possible at all levels of government.
 - 1.2 The type of provision should the constitution make for representative governments.
 - 1.3 The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities).
 - 1.3.1 The implementation of this principle with respect to provincial and local government should be left to the autonomy of the Provinces.
 - 1.4 Provision shall be made for referenda to be held at the request of a reasonably small number of dissatisfied citizens at all levels of government.
 - 1.5 Principle of electoral representation in the constitution.
 - 1.5.1 Provincial autonomy and principle of electoral representation in provinces.
- AGENDA:** Representative government could be at national level only or also at provincial and local government level. Direct democracy, such as referenda is not an alternative, but rather a supplement to representative democracy. It will be necessary to analyze the need of representative government at all levels with special regard to the plural nature of South Africa. The role of traditional leaders as administrators of traditional communities should also be studied. The relation between institutions of direct democracy and representative democracy should be considered.
- The constitution may be silent about the electoral system deferring any decision to the law, or could decide the general parameters of the electoral system, or could go into the details of the electoral system. The electoral systems, and each variations thereof, are too many to be mentioned.

Electoral boundary determination, and possible minimum thresholds to qualify for representation in parliament are also issues related to the electoral system. Pros and cons of constitutionalizing the electoral principles should be assessed against available comparative experiences.

All major electoral models should be studied to determine how they affect the type of democracy and political representation, the protection of minorities.

Techniques of drawing electoral boundaries and limiting representation to major parties only should be fully inventoried.

V. ACCOUNTABILITY

FREEDOM OF INFORMATION AND ACCOUNTABLE ADMINISTRATION

- 1.1 Freedom of information.
Procedures and mechanisms needed to make government as transparent as possible.
The limits of discretion which should be set for Ministers of State charged with security matters.
- 1.2 The constitution and the right to access government information.
- 1.2.1 The right to access all government information and private data bank's information entrenched in the constitution subject to:
 - 1.2.2 Customary qualifications and exclusions, subject to judicial review.
- AGENDA: The constitution may not consider this aspect of social life or may provide for the constitutional principles which will guide the adoption of a Freedom of Information Act. The FOIA of the USA should particularly studied as a reference point in conjunction with provisions in modern constitutions, such as Spain, which have constitutionalized the right to access government information

2. ACCOUNTABLE ADMINISTRATION.

- 2.1 Political, legal and judicial mechanisms necessary to make government accountable.
- 2.2 How should the constitution deal with the principle of administrative accountability?
- 2.3 The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
- 2.4 Public officials shall be personally responsible for gross negligence and malice.
- 2.5 Provisions to be made for the recognition of the right to petition any government structure.
- 2.6 The constitution should entrench the notion of participation of the affected public interest in the formative process of an administrative action or regulation.
- AGENDA: The constitution may relegate administrative accountability as a part of the political responsibility of the party in power, or alternatively could provide for specific means of accountability, administrative justice and participation of the public in administrative procedures. The Committee should classify and study tools of administrative accountability, including (a) administrative justice based on judicial review of administrative actions and regulations, (b) personal liability

of public officials, (c) Public Service commissions, and (d) participation of affected interests in all relevant executive or regulatory actions of government. This last aspects should be particularly analyzed with respect to the experience of the USA. Special attention could be given to the IFP proposal for a Regulatory Relief Commission and the report of the US Grace Commission.

ISSUES LEFT TO BE CONSIDERED

PREAMBLE

NAME AND SYMBOLS OF COUNTRY,

LANGUAGE,

ECONOMY CONSTITUTION,

RELATION OF INTERNATIONAL LAW AND INTERNATIONAL LEGAL SYSTEM

0687

November 14, 1994

